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IN THE

Supreme Court of The United States

OCTOBER TERM, 1973

NO. 73-725

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
Petitioner,

vs.

SCHOOL CITY OF ELKHART, INDIANA: THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP; OSOLO SCHOOL TOWNSHIP; WASHINGTON SCHOOL TOWNSHIP; ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

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IN THE

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NO. _____

STATE OF INDIANA, ON THE RELATION AND FOR THE USE OF CONCORD COMMUNITY SCHOOLS, ELKHART COUNTY, INDIANA,
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vs.

SCHOOL CITY OF ELKHART, INDIANA; THOMAS BLACKBURN, as President and Trustee of School City of Elkhart, Indiana; MARION SHELLEY, as Vice-President and Trustee of School City of Elkhart, Indiana; JOHN BURT, as Secretary and Trustee of School City of Elkhart, Indiana; RALPH MILLER, as Treasurer and Trustee of School City of Elkhart, Indiana; PHILIP BYRON, as Trustee of School City of Elkhart, Indiana; JOE C. RICE, as Superintendent of School City of Elkhart, Indiana; CLARE F. GARBER, as Auditor of Elkhart County, Indiana; EVERETT L. DANIELSON, as Treasurer of Elkhart County, Indiana; CLEVELAND SCHOOL TOWNSHIP; OSOLO SCHOOL TOWNSHIP; WASHINGTON SCHOOL TOWNSHIP; ELKHART COMMUNITY SCHOOLS; LOUIS B. MILLER, ROBERT BOGER, ELWOOD BRANNAN, RICHARD DOUTLICK, NELSON C. EATON, CHARLES FIELDS, LA VERN HOSTETLER, ORVILLE MILLER, CLIFFORD SMITH, as members of and constituting the Elkhart County School Reorganization Committee; CUSTER BAKER, CHESTER BIDDLE, J. WILLIAM CHAMBERS, JOHN J. DILLON, AMELIA COOK, DICK HELLER, JR., HERBERT C. HOLMES, WILLIAM E. WILSON, BRYCE BOTTOM, as members of and constituting the Indiana State Commission for the Reorganization of School Corporations,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF INDIANA

Petitioner respectfully prays that a writ of certiorari issue to review the final decree of the Supreme Court of the State of Indiana entered herein on August 6, 1973, denying transfer of this cause and thereby affirming the decision of the Indiana Court of Appeals (3rd Div.) in

this cause dated January 30, 1973, rehearing denied March 1, 1973.

OPINION BELOW

The decree of the court below was not accompanied by a written majority opinion. The decree and a dissenting opinion of the Indiana Supreme Court are reported in 299 N.E. 2d 829. Prior reported decisions in this cause are *School City of Elkhart et al. v. State ex rel. Concord Community Schools, Elkhart County, Indiana, et al.* (June 20, 1967), 248 Ind. 511, 227 N.E. 2d 672, rehearing denied, October 6, 1967, 248 Ind. 511, 229 N.E. 2d 824; (January 30, 1973, Indiana Court of Appeals), 291 N.E. 2d 715, rehearing denied March 1, 1973. Opinions in a connected case are reported in *Concord Community Schools et al. v. State ex rel. Elkhart Community Schools, et al.* (April 22, 1970, Appellate Court of Indiana, Division 1), 257 N.E. 2d 338, rehearing denied May 21, 1970; (July 20, 1971, Supreme Court of Indiana), 271 N.E. 2d 468. All said reported opinions are printed in Appendix A of this petition.

JURISDICTION

The decree of the Supreme Court of Indiana denying transfer to that Court was dated and entered on August 6, 1973. No request for rehearing of such judgment is allowed under the Indiana Rules of Appellate Procedure, Rule 11, as amended, and none was made. No extension of time within which to petition for certiorari has been requested. The statutory provision believed to confer jurisdiction on this Court to review the judgment in question by writ of certiorari is 28 U.S.C. § 1257 and the Fourteenth Amendment to the Constitution of the United States.

The relevant portion of 28 U.S.C. § 1257 reads as follows:

> "Final judgments or decrees rendered by the highest court of a State in which a decision may be had, may be reviewed by the Supreme Court as follows:
>
> • • •
>
> "(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . . of the United States."

QUESTIONS PRESENTED

1. May the Supreme Court of Indiana, illegally sitting as a trial court, decide a declaratory judgment action on its merits, on a theory not offered or argued by the parties and on which a hearing had not been held and no evidence presented and thereby foreclose the right of Concord Community Schools, its residents, voters and taxpayers, to a hearing on the merits guaranteed by the due process provisions of the Fourteenth Amendment to the United States Constitution?

2. May the Supreme Court of Indiana deprive Concord Community Schools, its residents, voters, and taxpayers of procedural due process notice of administrative and court hearings and voting required by Indiana law, on a record devoid of evidence that such procedures had been followed?

3. Did the Indiana Supreme Court violate the right of Concord Community Schools, its residents, voters and taxpayers to due process of law when it transferred from Concord territory and tax base annexed by the City of Elkhart after the procedural steps which should have been taken by Elkhart Community Schools to accomplish such a transfer had been completed?

4. Did the action of the Supreme Court of Indiana in depriving Concord Community Schools and its taxpayers of the revenues from areas annexed by the Civil City of Elkhart, Indiana without notice and hearing and without the proration of previously incurred liabilities Indiana law required, deprive Concord and its taxpayers of their property without due process of law?

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 14 to the United States Constitution reads in pertinent part as follows:

> "No state shall make or enforce any law which shall . . . deprive any person of life, liberty, or property, without due process of law. . . ."

STATUTORY PROVISIONS INVOLVED

The Indiana statute involved is "The School Corporation Reorganization Act of 1959," Ind. Acts of 1959, ch. 202, IC 1971 20-4-1, Burn's Ind. Stat. Ann. 1970 Replacement §§ 28-3501 *et seq.* The relevant sections are set forth in Appendix B to this petition.

STATEMENT OF THE CASE

Petitioner is the State of Indiana on the relation and for the use of Concord Community Schools, Elkhart County, (hereinafter referred to as "Concord") an Indiana school corporation and body politic. This is an action for injunction and for declaratory judgment to declare the rights of Concord and the respondent Elkhart Community Schools, Elkhart County (hereinafter referred to as "Elkhart"), an Indiana school corporation and body politic, as to four specified tracts of territory annexed

by the Civil City of Elkhart and claimed by Elkhart to be included in its school territory.

In 1959, by the adoption of Ind. Acts of 1959, ch. 202, the School Corporation Reorganization Act of 1959 (hereinafter referred to as "the 1959 Act"), the Indiana General Assembly mandated school reorganization in Indiana. Pursuant to the 1959 Act, a Comprehensive Plan for Elkhart County, Indiana, was developed including Concord with boundaries described as all of Concord Township outside the Civil City of Elkhart. Concord began its existence on July 1, 1964. The Plan proposed for Elkhart Community Schools was voted down in May and November of 1964. The proposed district for Elkhart was Elkhart School City, Cleveland School Township, Osolo School Township and Washington School Township. The boundaries set forth were Cleveland Township, Osolo Township, Washington Township and the Civil City of Elkhart combined as one unit.

On March 23, 1966, the identical plan for the Elkhart Community Schools was again proposed by the County Committee for the Reorganization of Schools of Elkhart County formed under the 1959 Act to the Indiana State Commission for the Reorganization of School Corporations created under the 1959 Act. The State Commission approved the plan on March 31, 1966, and the plan received a favorable vote at the primary election of May 3, 1966.

On each of the dates January 17, February 7 and 26 and May 16, 1966, the Common Council of the City of Elkhart enacted an annexation ordinance which annexed territory to the civil city which was, as of July 1, 1964, included in the territory of Concord School Corporation. Thereafter, Concord contended that the annexed territories remained with it for school purposes until a 1963 Indiana Act requir-

ing Concord's consent was complied with, while Elkhart contended that upon annexation, the annexed territories were automatically within its jurisdiction for school tax and pupil attendance and other school purposes pursuant to a 1957 Indiana Act. The respondent Elkhart County Treasurer and Auditor intended, unless restrained, to treat the annexed areas for tax purposes as part of Elkhart. This action for equitable relief and declaratory judgment followed, instituted by Concord.

The trial court, the Elkhart Circuit Court, held a hearing on whether a temporary injunction should issue. On July 29, 1966, the trial court entered a temporary injunction enjoining Elkhart and all other respondents from treating the annexed territories as a part of Elkhart school corporation for school and school tax purposes until the final hearing of the cause and the further order of the court. That decision was appealed by Elkhart to the Supreme Court of Indiana.

From the filing of the original complaint and through the briefing and argument and petition for rehearing in the Supreme Court of Indiana, Elkhart contended that the annexed areas automatically became a part of Elkhart's territory immediately upon annexation pursuant to Ind. Acts 1957, ch. 112, §§ 1-5, 1971 IC 20-4-16-1 through 5, Burns Ind. Stat. Ann. §§ 28-3626—28-3630. Concord, on the other hand, contended that Ind. Acts of 1963, ch. 296, IC 1971, 20-4-4-1 through 9, Burns §§ 28-3601—28-3609, was controlling. The 1963 Act required consent of both school corporations for transfer of territory. Stipulations showed that prerequisites of the 1963 Act to a change in territory had not been met. The 1957 Act did not require notices as to a change in school territory.

The Supreme Court of Indiana decided the case on an entirely new theory, that the 1959 Act applied.

The 1959 Act requires that: the preliminary and final school plans describe the boundaries of the proposed school corporation, give the disposition of the assets and liabilities if a school corporation is to be divided and the disposition of school aid bonds, if any, plus the assessed valuation, and assessed valuation per pupil, average daily attendance and property tax levies of each existing affected school corporation, § 5 (4), Burns § 28-3507 (b), (f) and (g); the county school committee must give notice of hearing on a school plan to all residents of school corporations affected and requires a hearing to be held, at which the county committee states the proposed adjustment of assets and liabilities if a school corporation is to be divided, § 5 (5) as amended, Burns § 28-3509 and § 5 (8), Burns § 28-3512; notice of public hearing must be given and hearing held in the county before the State Commission, § 6 (3), Burns § 28-3517 (e); notice of an election must be given to the registered voters residing within the boundaries of the proposed corporation, § 7 (2), Burns § 28-3529; the plan must be accepted or rejected by the registered voters residing within the boundaries of the proposed corporation, § 7 (2), Burns § 28-3520; a statement must be made in the legal notice of the election of the proposed terms of adjustment of property, assets, debts and liabilities of existing school corporations to be divided, § 7 (2), Burns § 28-3520; appeals are allowed by aggrieved persons to the State Commission from a decision of the county committee, and from the State Commission to the Courts within thirty (30) days after a decision of the State Commission, § 8, Burns § 28-3518. [The relevant texts of the 1959 Act are set out in full in Appendix B *infra*.]

Prior to the decision of the Supreme Court of Indiana, no hearing had been held or argument made that the 1959 Act notice and hearing due process requirements had been complied with. There was no evidence in the record to show that said procedures had been followed as to Concord, its registered voters, residents and taxpayers. The plan itself was in the record as Exhibit 4 to Plaintiff's Exhibit 2, (R. pp. 323-329), and comparison with the 1966 plan (R. pp. 271-320) which admittedly did not include Concord territory, shows them to be identical. Legal notices of hearings and election were at that time not in the record of the cause. As brought into the record later, they were shown not to refer in any way to Concord, its assets, debts, liabilities, residents, taxpayers or territory. The assessed valuation specified in the plan was the same as Elkhart's as of the 1964 proposed plan. Nevertheless the Supreme Court of Indiana decided:

> "The procedures required [by 1959 Act] were strictly followed and after approval by the State Commission of the County Committee's said proposal, the matter was submitted as required to the electorate of the territory involved in the proposal, which received an affirmative vote.
>
> • • •
>
> "The judgment herein rendered by the trial court is hereby reversed, with instructions to dissolve the temporary injunction, and the court is hereby ordered to enter a finding and judgment for the Appellants, defendants below, in accordance with the tenor hereof, both on the equity and the law questions presented." 227 N.E. 2d at 674-5.

Concord petitioned for rehearing. The opinion of the Supreme Court of Indiana denying rehearing reads as follows:

"In its Petition for Rehearing, the Appellee, Concord Community Schools, is critical of what does appear to be an erroneous statement of one fact. Annexation Ordinance #2145 was indeed enacted on May 16, 1966 and the last publication thereon was on May 31, 1966. The County Committee approved the plan for the creation of Elkhart Community Schools as of May 23, 1966, the State Commission approved it on March 31, 1966 and the same was voted on, together with other annexation ordinances, on May 3, 1966.

"When this cause was submitted, both parties, in their briefs and at the oral argument requested that this Court decide the basic issue involved. This Court did so and we do not regard Appellee's complaint as either well founded or justified in view of its own request.

"We stated that The School Corporation Reorganization Act of 1959, ch. 202, p. 451 et seq., was our primary guide at arriving at our decision. The opinion speaks for itself and ample language is contained therein to decide the questions presented upon reversal.

"Appellee's Petition for Oral Argument on the Petition for Rehearing is denied; the Petition for Rehearing is Denied." 229 N.E. 2d 824, 825.

Concord filed a Motion to Modify Mandate of the Court on November 16, 1967. Said Motion is lengthy and is reproduced in full in Appendix C to this Petition. (R. pp. 171-184) In said Motion, Concord requested the Supreme Court of Indiana to remand the cause to the trial court for reshaping and reforming the issues for trial under the 1959 Act, so that "the ends of justice will be best served" for the reasons that (1) the 1966 Elkhart plan did not show an intention to give Concord territory to Elkhart because it did not comply with the procedural due process notice,

hearing and voting and disposition of property requirements of the 1959 Act previously set out herein, (2) excerpts from minutes of meetings of the Indiana State Commission for the Reorganization of School Corporations on June 7, 1966 and November 2, 1966 demonstrate that the said State Commission intended to approve the incorporation only of the School City of Elkhart as of July 1, 1964 within Elkhart, and did not intend by approving the Elkhart plan to change the boundaries of Concord as they existed on July 1, 1964, and that if the said State Commission had intended to alter the territorial boundaries of Concord to include the annexed territory within Elkhart, it would have required that the Elkhart plan include provisions for the pro rata assumption of liabilities and indebtedness of Concord by Elkhart as mandated by the 1959 statute; (3) Concord and its taxpayers were indebted in amounts of approximately two million four hundred eighty-six thousand dollars ($2,486,000.00) plus an annual obligation of one hundred forty thousand dollars ($140,000.00) per year, all debts and liabilities incurred on the tax base which included the annexed territories; (4) an affidavit was attached showing that the registered voters in the annexed territory had not been allowed to vote on the Elkhart Plan. The legal notice of election on the Elkhart Plan and the plan itself were set out in the said Motion.

Concord and Elkhart had agreed, on June 7, 1966, that Elkhart, as the defendants

> "do not now, nor will they, or any of them, at any stage of this litigation, contend that the plaintiff does not have the legal right to challenge the validity of Elkhart Community Schools to the extent that such plan purports or may purport to bring within the boundaries of School City, or within the boundaries of Elkhart Community Schools after July 1, 1966, the

> **Annexed Territories, without challenging the validity of Elkhart Community Schools or such plan in toto: that this joint agreement may be filed by any party hereto at any stage of these proceedings, or without filing may be referred to either by written brief, orally or otherwise, at any stage of this proceeding."**

(This Joint Agreement was placed of record by Elkhart as Exhibit A to its Motion to Dismiss Concord's Petition to Modify Mandate to the Supreme Court.)

Concord's Motion to Modify Mandate of the Court was dismissed without comment by the Supreme Court on the 22nd day of November, 1967:

> "Motion of Appellants to Dismiss Petition by Appellee to Modify Mandate to the Trial Court is hereby sustained this 22nd day of November, 1967." (R. p. 194)

On November 17, 1967, Concord filed with the trial court a Motion for Leave to Amend Complaint, which motion is reproduced in Appendix D hereto. (R. pp. 168-184) Said Motion to Amend requested leave to add a new paragraph to the complaint alleging that the Elkhart Plan was not intended to remove territory from Concord and that due process notice and voting and division of liabilities required by the 1959 Act had not been complied with. As a memorandum to its Motion, Concord attached its Motion to Modify Mandate filed in the Supreme Court of Indiana. Concord on the same day requested a hearing and that evidence be heard on its complaint for declaratory judgment (R. pp. 186-187), alleging that:

> "The court has not heard evidence and has made no finding and has not declared the rights of the parties under the relief prayed for for declaratory judgment. . . . It would be unfair to the court and to the parties not to have a hearing and trial on the

> merits of the relief prayed for in the complaint for declaratory judgment under these circumstances. . . ." (R. pp. 186-187) [Set out in full in Appendix E, *infra*).

The trial court overruled Concord's Motion to Amend and Motion for a Hearing:

> "The Court after due consideration, now overrules and denies said motions." (R. p. 189, ll. 1-2)

This decision necessarily decided the constitutional due process questions raised by Concord.

On November 21, 1967, the trial court, without a hearing, entered judgment on the merits for Elkhart, declaring that all four annexed territories became a part of Elkhart for all school and tax purposes. (R. pp. 190-191, Appendix F, *infra.*)

On November 29, 1967, Concord moved to modify the trial court's judgment, as set out in full in Appendix G herein. (R. pp. 196-202) The grounds were that the judgment of the trial court did not conform to the Indiana Supreme Court's opinion as to Annexation Ordinance No. 2145, enacted after the Elkhart plan was voted on, that there was no finding by the court to support its judgment, and that the Supreme Court of Indiana intended that the lower court should apply the 1959 Act to the facts of the case in arriving at its decision. Said motion was overruled December 5, 1967:

> "The motion of the Plaintiff to modify the judgment which was heretofore filed herein is now by the Court overruled." (R. p. 203)

On December 19, 1967, Concord filed its Motion for a New Trial and Memorandum thereto (R. pp. 205-218) (printed in full Appendix H, *infra*), assigning as error

the trial court's denial of Concord's Motion for Leave to Amend its Complaint to raise due process questions under the 1959 Act, denial of Concord's motion for a hearing in that Concord had never been afforded a hearing on the facts after the time the Supreme Court decided that the 1959 Act applied, denial of Concord's motion to modify the trial court's judgment, and that the decision of the trial court was contrary to law and not sustained by sufficient evidence in that there was no evidence in the record to show that the notice and voting and property disposition due process requirements of the 1959 Act as to Concord itself, its residents, taxpayers and voters, had been complied with, and that the evidence and Supreme Court opinion showed that one of the annexed territories had been annexed after the plan had been voted on. A recent decision of the Indiana Appellate Court, *Duda v. New Prairie United School Corporation* (1967), 140 Ind. App. 528, 224 N.E. 2d 327, was called to the Court's attention. It held that territory annexed by a civil city does not automatically become a part of a school corporation which includes other territory in addition to the civil city.

The Elkhart Circuit Court overruled Concord's Motion for a New Trial:

> "The Court now overrules Plaintiff's motion for a new trial." (R. p. 229)

Concord appealed, assigning as error the trial court's overruling of Concord's Motion for a New Trial. (Appendix I, R. pp. 1-2) The grounds raised in the Appellant's Brief were that the trial court's judgment that the Supreme Court has decided the merits of the cause in its first decision was contrary to law in that the Supreme Court of Indiana was without constitutional and statutory jurisdiction under Indiana law to decide a case as though

it had original jurisdiction, and that the failure of notice, hearings, elections and property disposition required by the 1959 Act violated the due process portion of the 14th Amendment to the United States Constitution.

The Indiana Court of Appeals, Division 3, dismissed the appeal on March 1, 1973, with a written opinion found at 219 N.E. 2d 715. (Appendix A *infra.)* The gist of the opinion is that the Supreme Court of Indiana decided the action for declaratory judgment on its merits in its decision in the first appeal. Rehearing was denied March 1, 1973. The Court of Appeals' decision was based in part upon a decision of the Supreme Court of Indiana in a prior case. There, Elkhart had filed a declaratory judgment action to determine the validity of a plan filed for Concord and approved by the Indiana State Commission for the Reorganization of School Corporations effective July 1, 1968 to place within Concord territory the annexed territories here in dispute. The trial court held in Elkhart's favor, the Court of Appeals reversed, (1970), 257 N.E. 2d 338, and the Supreme Court of Indiana reversed the Court of Appeals and affirmed the judgment of the trial court. (1971), 271 N.E. 2d 468. (Both of those opinions are set out in full in Appendix A *infra.*)

Concord petitioned the Supreme Court of Indiana for transfer, alleging again that Concord was deprived of due process of law guaranteed by the 14th Amendment to the United States Constitution. (Appendix J, *infra.*) On August 6, 1973, transfer was denied. (Appendix A, *infra.*)

REASONS FOR GRANTING THE WRIT

If this Court does not issue a writ of certiorari in this cause, the Supreme Court of Indiana, sitting without legal authority as a trial court, will successfully deprive Con-

cord and its residents, voters and taxpayers, of their constitutional rights to a hearing on the question of whether they obtained due process of law guaranteed by a 1959 Indiana statute and the Fourteenth Amendment to the United States Constitution.

This case was filed as a suit for a declaratory judgment as to the people of Concord's rights under 1963 and 1957 Indiana statutes. A hearing on a temporary injunction was held, with evidence presented as to the 1963 and 1957 Acts. On appeal, the Supreme Court of Indiana decided the declaratory judgment action on the merits under a 1959 Act. *No hearing for affected parties has ever been held to determine the facts to which the 1959 Act was applied by the Supreme Court of Indiana*, contrary to this court's interpretation of the due process provision of the Fourteenth Amendment to the United States Constitution, *Fuentes* v. *Shevin* (1972), 407 U.S. 67, 80, 32 L. ed. 2d 556, 569, 92 S. Ct. 1938. A "full hearing" means:

> "that every party shall have the right to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. . . . Such a hearing is essential for a wise and just application of the authority of administrative board and agencies." *U.S.* v. *Storer* (1956), 351 U.S. 192, 202, 100 L ed. 1081, 76 S. Ct. 763.

Although the Indiana Supreme Court in its opinion on the first appeal of this cause held that the procedural requirements of the 1959 Act had been followed by the county and state administrative agencies involved, and that it therein decided the case on the merits, its statement in the opinion on the rehearing of the cause on the first appeal that "The opinion speaks for itself and ample language is contained therein to decide the questions pre-

sented in reversal," plus its admission that it had made an error of fact as to the time at which the fourth territory was annexed, could easily be interpreted to require the trial court to apply the 1959 Act to the facts presented by the parties on reversal. This interpretation was not necessarily foreclosed by the Indiana Supreme Court's dismissal of Concord's Motion to Modify Mandate. When, however, the trial court refused to allow Concord to amend its complaint to raise procedural due process questions under the 1959 Act and the Fourteenth Amendment and entered judgment on the basis of the Indiana Supreme Court's opinion, the United States constitutional question of the people of Concord's right to a hearing was necessarily decided. The trial court's ruling was upheld by the Indiana Court of Appeals on the basis of the Indiana Supreme Court's opinion in the first appeal and in the case of *Concord Community Schools et al.* v. *State ex rel. Elkhart Community Schools, et al.*, 271 N.E. 2d 468. (Appendix A, *infra.*) The Indiana Supreme Court's refusal to transfer the cause to consider the constitutional issue effectively foreclosed a hearing in Indiana courts for the people of Concord on their constitutional rights. The effect was that the Indiana Supreme Court did decide the case on its merits on the first appeal, sitting as a court of original decision, as to a statute and facts not presented or argued by the parties. That decision violated a long line of decisions by the Supreme Court of Indiana which held that under the Indiana Constitution, Article 7, § 4, as it then existed, the Indiana Supreme Court had no jurisdiction in declaratory judgment actions, *Spence* v. *State* (1943), 221 Ind. 474, 48 N.E. 2d 459; *Danker* v. *State* (1956), 236 Ind. 696, 138 N.E. 2d 900. The court had also consistently held that consent of the parties could not confer jurisdiction not given by law, *Branson* v. *Stude-*

baker (1892), 133 Ind. 147, 33 N.E. 98; *Smith* v. *Myers* (1886) 109 Ind. 1, 9 N.E. 692; *Davis* v. *Davis* (1871), 36 Ind. 160. The federal right to a full hearing before facts are decided thus was denied by the Supreme Court of Indiana's violation of a procedural rule, which was not expressly overruled therein, has not been overruled since, and the operation of which in this cause could not have been foreseen by Concord. Such a violation of the people of Concord's right to due process by the state judiciary is as clear as when accomplished by the legislature and will be redressed by this Court, *Bouie* v. *Columbia* (1964), 378 U.S. 347, 354-355, 112 L. ed. 2d 894, 900, 84 S. Ct. 1697. When the act complained of is the act of the Supreme Court of the state done unexpectedly, and the same court thereafter decided that the people of Concord no longer had any right to a hearing or to add to the record, it is a case for this Court to decide. *Saunders* v. *Shaw* (1917), 244 U.S. 317, 61 L. ed. 1163, 37 S. Ct. 638; in accord, *Missouri ex rel. Missouri Insurance Co.* v. *Gehner* (1930), 281 U.S. 313, 74 L. ed. 870, 50 S. Ct. 326.

The decision below should be reviewed because Concord, its residents, taxpayers, parents of school children and voters in the annexed territories, have been deprived by the Indiana Supreme Court of notice of the transfer of territory in the administrative hearings required as procedural steps in the annexation of Concord's territory under the 1959 Act. Registered voters in the annexed territory were also deprived of their right to vote on the Elkhart Plan. There is no question presented here concerning the constitutional validity of the 1959 Act. It requires the above procedural notices and voting. Under Indiana law, such procedural requirements concerning the formation of school corporations must be strictly followed, and no court is entitled to ignore or vary such procedure.

Persons affected by a change in a school corporation have a right to require that the procedures be followed. *State ex rel. Jones* v. *Johnson Circuit Court* (1962), 243 Ind. 7, 12, 181 N.E. 2d 857, 860; *Wright* v. *Kinnard* (1969), 144 Ind. App. 286, 245 N.E. 2d 835. The United States Constitution also requires that parties be given procedural due process granted by law in administrative proceedings, *U.S.* v. *Storer* (1956) 351 U.S. 192, 202, 100 L. ed. 1081, 76 S. Ct. 763.

The Supreme Court of Indiana, in its opinion in the first appeal of this cause, decided that the procedures under the 1959 Act had been followed on a record devoid of evidence that such procedures had been followed as to Concord and its taxpayers and residents and the voters in the annexed territories. The record did affirmatively show at that time that the Elkhart plan itself failed to mention Concord, its tax payers, voters and residents. Listing of Concord territory to be transferred was required by the 1959 Act were Concord to be affected, and the plan was required to specify the disposition of assets and liabilities between Concord and Elkhart. The record shows the plan did not. If any resident of Concord, including the annexed territories, had read the plan and the notices given thereunder, none could have guessed that the annexed territories were to be included within Elkhart. There was no notice reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the transfer, as required by the Fourteenth Amendment as interpreted by this Court, *Schroeder* v. *City of New York* (1962), 371 U.S. 208, 211 L. ed 2d 255, 258, 83 S. Ct. 279. In its motion to Modify Mandate of the Indiana Supreme Court on the first appeal, also attached and incorporated into Concord's Motion for Leave to Amend Complaint, Concord showed that voters in the

annexed territories had not been given notice of the election as required by the 1959 law, and that voters in the annexed territories were not allowed to vote on the Elkhart plan as required by the 1959 Act. Concord further showed therein that the Indiana State Commission on the Reorganization of Schools had not intended to and did not realize it was transfering Concord territory to Elkhart by approving the Elkhart plan. This intention was further demonstrated by the State Commission's subsequent action in approving a 1968 Concord plan specifically placing the annexed territories in Concord, which the Indiana Supreme Court reversed as an attempt to overrule the Indiana Supreme Court's decision in the first appeal of this cause. 271 N.E. 2d 468 (See Appendix A, *infra.*)

> "For more than a century the central meaning of procedural due process has been clear: 'Parties whose rights are to be affected are entitled to be heard; and in order that they may enjoy that right they must first be notified.' " *Fuentes* v. *Shevin* (1972), 407 U.S. 67, 80, 32 L. ed. 2d 556, 569, 92 S. Ct. 1983.

The Supreme Court of Indiana, by declining transfer in the second appeal, decided that Concord had received due process under the 1959 Act on the record presented to it in the first appeal, and thereby effectively denied notice to Concord, its residents, taxpayers and voters.

The most outrageous result of the decisions of the Indiana Supreme Court in this cause is the fact that the territory annexed by Annexation Ordinance No. 2145, the fourth ordinance, is thereby included in Elkhart. The Indiana Supreme Court admitted in its opinion on rehearing in the first appeal that, in its original opinion, there

> "does appear to be an erroneous statement of one fact. Annexation Ordinance #2145 was indeed enacted on May 16, 1966 and the last publication thereon was

> on May 31, 1966. The County Committee approved the plan for the creation of Elkhart Community Schools as of May 23, 1966, the State Commission approved it on March 31, 1966 and the same was voted on, together with other annexation ordinances, on May 3, 1966." 229 N.E. 2d 824.

The ordinance was enacted on May 16, 1966, after all of the "procedures" required by the 1959 Act and ending in the vote on May 3, 1966 should have been completed. Obviously, there was no way that notice could have been given to Concord, its taxpayers, residents and voters, and hearing had as to the territory involved in Ordinance No. 2145. The Supreme Court of Indiana thereby deprived Concord, its taxpayers, voters and residents, of due process of law.

The Indiana Supreme Court further has deprived Concord and its taxpayers of property without due process of law. Concord and its taxpayers remain financially responsible for Concord's bonds and other legally binding financial liabilities previously issued on the basis of including the annexed territory in its tax base. The Elkhart plan did not contain provisions for any division of assets and liabilities of Concord, contrary to the 1959 Act. The Indiana State Commission for the Reorganization of Schools would not have approved the Elkhart plan without provision for the payment by Elkhart of Concord's bonds and liabilities attributable to the tax base annexed by the city of Elkhart as required by the 1959 Act, had it had any reason to believe or know that such territories were included in the Elkhart plan. The judicial fiat of the Supreme Court of Indiana in refusing to allow a hearing on this issue deprived Concord and its taxpayers of their property without just compensation, contrary to the Fourteenth Amendment to the United States Constitution. No

such issue was presented or raised in this cause prior to the trial court's interpretation of the Indiana Supreme Court's opinion on the first appeal. Under such circumstances, this Court will take the cause to redress the wrong, *Baltimore & Ohio Ry. Co.* v. *United States* (1936), 298 U.S. 349, 362-363, 80 L. ed. 1209, 1220, 56 S. Ct. 797.

CONCLUSION

For the reasons set forth above it is respectfully submitted that this petition for a writ of certiorari should be granted.

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